

No. 91-519

Supreme Court of Georgia
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In The
Supreme Court of the United States

October Term, 1991

LARRY RUSSELL DOSSETT,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

Petition For Writ Of Certiorari To
The Supreme Court Of Georgia

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1)

Whether the construction of O.C.G.A. § 40-13-23(a) by the Supreme Court of Georgia so as to require a written waiver of jury trial in a criminal case solely to secure personal jurisdiction over the defendant, a right which is deemed waived if not asserted in the trial court, in any way implicates the right to trial by jury secured by the Sixth Amendment to the United States Constitution?

(2)

If so, whether the Sixth Amendment issue is preserved for review by this Court where the issue was not raised below?

(3)

Whether the construction of O.C.G.A. § 40-13-23(a) by the Supreme Court of Georgia, correcting an earlier, erroneous construction of the Georgia Court of Appeals, implicates the constitutional prohibition against ex post facto laws?

PARTIES TO THE PROCEEDING

The caption contains the correct and proper names of all parties to this proceeding.

TABLE OF CONTENTS

	Page(s)
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVI- SIONS INVOKED	2
STATEMENT OF THE CASE	2
REASONS FOR DENIAL OF THE WRIT	
A. THE CONSTRUCTION GIVEN TO THE GEORGIA STATUTE FAILS TO IMPLICATE ANY CONSTITUTIONAL PROVISION AND IS THUS NOT SUBJECT TO ATTACK BEFORE THIS COURT	4
B. PETITIONER'S FEDERAL CLAIMS WERE NOT RAISED BELOW, AND ARE THUS NOT PRESERVED FOR REVIEW BY THIS COURT	4
C. THE STATUTORY CONSTRUCTION DOES NOT VIOLATE THE EX POST FACTO CLAUSE	6
CONCLUSION	7

TABLE OF AUTHORITIES

	Page(s)
<i>Boykin v. Alabama</i> , 395 U.S. 238 (1969).....	5, 6
<i>Collins v. Youngblood</i> , 497 U.S. ___, 111 L.Ed.2d 30 (1990)	6
<i>Landmark Communications, Inc. v. Virginia</i> , 435 U.S. 829 (1978)	5
<i>Nicholson v. State</i> , 261 Ga. 197, 403 S.E.2d 42 (1991) ...	3, 4
<i>Schad v. Mt. Ephraim</i> , 452 U.S. 61 (1981).....	4
<i>Thompson v. Utah</i> , 170 U.S. 343 (1898)	7

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OPINIONS BELOW

Petitioner was convicted after a bench trial of the offenses of driving under the influence of alcohol or drugs and speeding in the Probate Court of Meriwether County on December 6, 1988, in an unreported decision. Petitioner appealed to the Superior Court of Meriwether County, which affirmed the conviction in an unpublished order reproduced in the Appendix to the Petition for Writ of Certiorari. On appeal from the Superior Court of Meriwether County, the Georgia Court of Appeals affirmed the judgment due to Petitioner's procedural default in failing to raise the issue before the Superior Court. The

opinion, reproduced as an appendix in the Petition, is reported at 197 Ga. App. 139, 398 S.E.2d 24 (1990). Petitioner then filed a Petition for Writ of Certiorari with the Supreme Court of Georgia, which affirmed, with a modification, the judgment of the Court of Appeals. That opinion, likewise reproduced in the Petition as an appendix, is reported at 261 Ga. 362, 404 S.E.2d 548 (1991).

STATEMENT OF JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a), which authorizes review, by writ of certiorari, of a decision of the highest court of a state in a case where a right, privilege, or immunity is specifically claimed under the Constitution of the United States. Respondent concedes that this Court possesses jurisdiction to consider the Petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

Respondent agrees that Petitioner has set forth the relevant constitutional provisions in the Petition.

STATEMENT OF THE CASE

Petitioner was charged with the misdemeanor criminal offenses of speeding and driving under the influence by a law enforcement officer in the State of Georgia. The charges were made returnable to the Probate Court of

Meriwether County. After a bench trial, Petitioner was found guilty on December 6, 1988, and subsequently sentenced.

Georgia's statutory scheme provides for review of that judgment in the Superior Court of the county in which the probate court sits. O.C.G.A. § 40-13-28. Although afforded the opportunity to submit a Brief, Petitioner failed to do so. Following a review of the record and transcript, the Superior Court issued an Order on March 5, 1990, affirming the Probate Judge's determination that Petitioner was guilty of the offenses of driving under the influence and speeding.

From that Order, Petitioner pursued an appeal to the Georgia Court of Appeals, which affirmed the conviction for driving under the influence (the opinion makes no mention of the speeding charge; apparently no appeal was taken from that judgment). Petitioner asserted before the Court of Appeals that the Probate Court lacked jurisdiction to consider the charges due to its alleged failure in failing to obtain a written waiver of jury trial. The Court of Appeals found that Petitioner had failed to preserve the question for appellate review by failing to raise it in the court below (the superior court).

Petitioner then sought certiorari to the Supreme Court of Georgia, which granted the Petition to consider whether the issue raised by Petitioner was, in fact, procedurally defaulted due to Petitioner's failure to raise the issue in the superior court. Subsequent to the grant of certiorari, but prior to the issuance of a decision, the Georgia Supreme Court issued its opinion in *Nicholson v. State*, 261 Ga. 197, 403 S.E.2d 42 (1991). In *Nicholson*, the

court held that the statutory requirement of a written waiver of jury trial addressed the court's personal jurisdiction over the defendant, rather than its jurisdiction over the subject-matter of the charges. Accordingly, the court held in *Nicholson* that failure to raise the lack of a written waiver in the probate court barred all appellate review as to that issue. Accordingly, in the case at bar, the court affirmed the judgment of the Court of Appeals, although disapproving the implication that the issue could be preserved by asserting it for the first time in the superior court. After the denial of a motion for Reconsideration, Petitioner filed a Petition for Writ of Certiorari with this Court.



REASONS FOR DENIAL OF THE WRIT

A. THE CONSTRUCTION GIVEN TO THE GEORGIA STATUTE FAILS TO IMPLICATE ANY CONSTITUTIONAL PROVISION AND IS THUS NOT SUBJECT TO ATTACK BEFORE THIS COURT.

Petitioner first challenges the construction given by the Georgia Supreme Court to the provisions of O.C.G.A. § 40-13-23 and appears to seek this Court's aid in correcting an allegedly erroneous statutory interpretation given by the Georgia Supreme Court. This, of course, is beyond the jurisdiction granted to this Court. The construction of state statutes is a matter for the state courts, and that construction is not subject to review so long as the statute, as construed, does not offend the United States Constitution. *Schad v. Mt. Ephraim*, 452 U.S. 61, 65 (1981);

Landmark Communications, Inc., v. Virginia, 435 U.S. 829, 837 n.9 (1978). Even then, the remedy is not an alternative construction by this Court; rather, the statute must be declared unconstitutional. *Id.*

In an apparently secondary argument, Petitioner also contends that the Supreme Court's holding conflicts with this Court's decision in *Boykin v. Alabama*, 395 U.S. 238 (1969), which requires that a guilty plea be made voluntarily and intelligently with an understanding of the nature of the charge and the consequences of the plea. The *Boykin* analysis is inapplicable as Petitioner did not enter a guilty plea, but was convicted after a trial. Petitioner has failed to point to any decision of this Court requiring or even suggesting that a waiver of jury trial (as opposed to the waiver of trial by the entry of a plea of guilty) be made knowingly, voluntarily, and intelligently. More importantly, however, this issue is simply not presented in the case at bar.

The opinions of the Georgia Supreme Court and the Georgia Court of Appeals do not in any way, shape, or form even purport to address the Sixth Amendment right to trial by jury in a criminal case; rather, the courts have done nothing but interpret a supplemental state statutory provision governing jury trials in criminal cases so as to provide that a defendant seeking a jury trial pursuant to the state statutory provision must affirmatively request that trial or be deemed to have waived it. No federal issue was ever presented by Petitioner to the Georgia courts, and no federal issue has been addressed in their opinions. While it may well be, as Petitioner contends, that the statutory provision in question was enacted by Georgia's General Assembly for the purpose of furthering

this Court's decision frowning upon implied waivers, nevertheless, the statute does not purport to be exclusive in nature, nor an embodiment of the Sixth Amendment's protection, and its construction therefore presents nothing for review by this Court.

B. PETITIONER'S FEDERAL CLAIMS WERE NOT RAISED BELOW, AND ARE THUS NOT PRESERVED FOR REVIEW BY THIS COURT.

Furthermore, the *Boykin* issue was not raised below and is thus not preserved for review by this Court. The opinions of the Georgia Supreme Court and the Georgia Court of Appeals do not in any way, shape or form even purport to address the Sixth Amendment right to trial by jury in a criminal case. No federal issue was ever presented by Petitioner to the Georgia courts, and no federal issue has been addressed in their opinions.

C. THE STATUTORY CONSTRUCTION DOES NOT VIOLATE THE EX POST FACTO CLAUSE.

Finally, Petitioner contends that application of the procedural change in question violates the ex post facto provisions contained in the United States Constitution. This Court has recently had occasion to review the application of the ex post facto clause to state criminal statutes. *Collins v. Youngblood*, 497 U.S. ___, 111 L.Ed.2d 30 (1990). The Court, overruling several earlier decisions, held that the ex post facto clause is violated only by punishing as a crime an act previously committed which was innocent when done; by making more burdensome

the punishment for a crime after it has been committed; or by depriving one charged with a crime of a defense available when the act was committed. *Id.*, at 45. Significantly, the Court specifically overruled *Thompson v. Utah*, 170 U.S. 343 (1898), in which the Court had held that a state provision providing for trial by an eight person jury, rather than twelve, violated the ex post facto clause. In overruling *Thompson*, the Court stated that:

... the right to jury trial provided by the Sixth Amendment is obviously a "substantial" one, but it is not a right that has anything to do with the definition of crimes, defenses, or punishments, which is the concern of the ex post facto clause.

Id. Thus, the decision of the Georgia Supreme Court correcting a prior erroneous interpretation of the statute in question by the Georgia Court of Appeals in no way implicates the ex post facto clause of the United States Constitution.

CONCLUSION

For the above and foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari. The correctness of the construction of the statute in question by the Georgia Supreme Court is not a matter for this Court's consideration. The statute in question has no application to the Sixth Amendment right to trial by jury, but is merely a supplemental statutory right to jury trial, which may be granted and waived in accordance with state law. Only

issues regarding the correctness of the statutory interpretation, and the application of state law regarding appellate procedure, were addressed below. The correction of earlier erroneous decisions of a lower court does not violate the ex post facto clause where any modification is procedural only, and does not affect the definition of or punishment for crimes, or preclude a defendant from presenting a previously valid defense to the charges.

Respectfully submitted,

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